NO. 983

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

ALASKA FISH & LUMBER COMPANY,
Plaintiff in Error,
vs.
EDWARD A. CHASE,
Defendant in Error.

Upon Writ of Error to the United States District Court, for the District of Alaska, Division No. 1.

BRIEF OF DEFENDANT IN ERROR.

MALONY & COBB,
Attorneys for Defendant
in Error.

DAILY RECORD-MINER, JUNEAU.

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Statement of the Case.

We will not attempt a reply to the Brief of the Plaintiff in Error, (it has not been served, and probably will not be in time for us to answer it,) but will

endeavor to show that the judgment of the court below is right and should be affirmed.

The action was for the breach of a contract of hiring. It was alleged that the plaintiff was by occupation a fisherman, skilled in the work of taking, canning, and otherwise preparing salmon and other fish in quantities for the market, that on February 14th, 1902, he was employed by the defendant as superintendent of its cannery, for a year, beginning March 1st, 1902, at a stipulated wage of $200.00 per month, board, and expenses to and from Seattle to the cannery at Skokan, Alaska; that plaintiff immediately entered upon the duties of his employment and faithfully performed the same until the 24th day of June, 1902, when he was without cause discharged, in violation of said contract; that the plaintiff had endeavored to secure other employment but was unable to do so, because of the nature of the business of fishing, whereby canning men employ their men by the year or season; and alleged damages in the sum of $2,068.33. (Rec. 1—3.) The defendant answered, admitting the contract, but justified the discharge on the ground of plaintiff's alleged incompetency, want of skill, and negligence; and a settlement in full of all claims, and a release in writing for the same. (Rec. p. 6—8.) The reply put in issue the allegations of the answer. (Rec. 9.) The case was tried to a jury, and resulted in a verdict for plaintiff for $1,773. Motion for new trial was made, and overruled, and judgment entered on the verdict.

The Assignments of Error.

There are three.

I.

This assignment challenges the action of the lower court in overruling the defendant's demurrer to the complaint. The demurrer is general, that the complaint does not state facts sufficient to constitute a cause of action. (Rec. 4—5.) The contention of the defendant under this assignment is that the complaint declares upon a contract of hire and seeks to recover for constructive wages. The contention seems to us frivolous, but it was urged with great earnestness upon the lower court, and was fully considered by it, in an able opinion found in the record. We feel that we can do no better than to refer the court to that part of the opinion dealing with this question, beginning on page 21 of the printed record, and ending on page 25, and adopt the same as our argument thereon.

II.

This assignment challenges the correctness of the following clause of the court's charge on the measure of damages, viz, "That the true rule as to the measure of damages if plaintiff is entitled to recover at all, under the evidence and these instructions, would be the amount due on the contract from the 1st day of March up to the present time, less the amount that has been paid. That is the true rule as to the measure of damages."

This clause, standing alone, might be susceptible of criticism, but taken into conjunction with the

undisputed facts and the context of the charge given, it correctly stated the law. The plaintiff testified (Rec. 51—52) to making all reasonable efforts to secure other employment after his discharge and his failure to do so. The court's charge on the measure of damages is as follows:

Now, as to the measure of damages: That is what the defendant agreed to pay this man—if he has a right to recover at all, viz: two hundred dollars per month and board. If there were proof upon the question, he would be entitled to the expense of a return trip to Seattle, because, as I understand, it is a part of the contract. Now, for what time may he recover? The allegation of the complaint is that they or he was damaged by reason of the discharge and consequent violation of the contract of hire. If the plaintiff had waited until the end of the year specified in his contract of hire, he might recover for the whole term mentioned in the contract—if entitled to recover at all. But the question now is, what was the damage he sustained by reason of such discharge? What the future holds in store for any one, no one can tell. If a man were sick, or should he die, that would terminate his contract of hire and he could recover nothing beyond that period. We are all liable to die at most any time, so uncertain is the future, that to say a man will live for any time and may recover damages up to any time in the future, is a proposition that is too uncertain to constitute a measure of damages. Evidence has been offered in this case on the part of plaintiff, without objection, that he had

made an effort to obtain employment from the time of his discharge, I believe, up to the present time; and that he had been unable to secure employment. Because of that declaration, uncontradicted and coming before the court and jury without objection, I say to you, the measure of damages in this case, if the plaintiff recovers, and you find he is so entitled to do, is the wages he was to receive from the time he was paid off up to the present time, the date of this trial; and such damages for board during the meantime, as he is entitled to under the evidence before you.

"Perhaps, I should state to you further, that the true rule as to the measure of damages, if the plaintiff is entitled to recover at all under the evidence and these instructions, would be the amount due on the contract from the first day of March up to the present time, less the amount that has been paid. That is the true rule as to the measure of damages, although the way I stated it before would amount perhaps to the same thing in the end." (Rec. 56—58.)

This instruction, we submit, correctly stated the law.

Leatherberry vs. Odell, 7 Fed., 642.

Park Bros. vs. Bushnell, 60 Fed., 582.

Saxonia Mining Co. vs. Cook, 4 Pac. Rep., 1111.

In Leatherberry vs. Odell, Dick J. instructed the jury that where the defendants, without sufficient cause, discharged the plaintiff from their service before the expiration of the term, the *prima facie* measure of damages was the amount which she would have

received, had the contract been fulfilled; and that the burden was upon the defendants to show that the plaintiff did, or by reasonable dilgence could have received other employment in business of the same kind or similar to that mentioned in the contract. (7 Fed., pp. 646—7.)

In the case at bar, the defendant neither plead nor attempted to prove anything in mitigation of damages. The plaintiff, on the other hand, showed, that he had made all reasonable efforts, after his discharge, to secure employment, and had failed. Under this state of fact the measure of damage given by the jury was clearly the measure of the plaintiff's loss.

Incidentally, the same principles are announced by the Supreme Court of Colorado, in Saxonia Mining Co. vs. Cook. See 4 Pac., 1113, and authorities there cited.

III.

The third assignment raises no question, that this court will consider, under principles too well established to require citation of authorities.

In conclusion, we respectfully submit, that the judgment below should be affirmed with damages for delay. The case is one of peculiar hardship to the plaintiff. Employed for the full term of a year, to work at a point a thousand miles away from home, he is discharged without cause in the midst of the fishing season, when, owing to wellknown conditions in the fishing business, it is practically impossible to secure other employment for the current year. When sued, the defendant hardly attempts a defence, but seeks

all the delay possible. (See the comments of the trial court on page 29 of the record.) From a just and inevitable judgment, a Writ of Error is sued on Assignments of Error that seem wholly without merit.

Nelson vs. Flint, 166 U. S., 276.

Respectfully submitted,

MALONY & COBB,

Attorneys for Defendant in Error.